Supreme Court, U.S.
FILED
AUG 14 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 14-990

In The
Supreme Court of the United States

STEPHEN M. SHAPIRO, *et al.*,
Petitioners,

v.

DAVID J. MCMANUS, JR., Chairman,
Maryland State Board of Elections, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* VIRGINIA STATE CONFERENCE OF THE NAACP IN SUPPORT OF PETITIONERS

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BRIEF OF VIRGINIA NAACP AS *AMICUS CURIAE* SUPPORTING PETITIONERS

This brief is submitted on behalf of the Virginia State Conference of the National Association for the Advancement of Colored People ("Virginia NAACP") as *amicus curiae* in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The National Association for the Advancement of Colored People is one of the oldest and largest civil rights organizations in the United States. Its state conference in Virginia, the Virginia NAACP, is a non-partisan, non-profit membership organization with more than one hundred active branches and approximately 16,000 members throughout the Commonwealth of Virginia. One of the priorities of the Virginia NAACP is to advance and defend the voting rights of its members, including the right to be free from racial discrimination in voting and to elect candidates of their choice at every level of government. To that end, the Virginia NAACP has engaged in a variety of public education and community outreach activities to help assure that minority voters have an equal opportunity to participate in the political process.

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party and have so informed the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Additionally, the Virginia NAACP, its branches, and its members have regularly engaged in voting rights and redistricting litigation in Virginia courts and in the Fourth Circuit. These cases have included claims under the United States Constitution and Voting Rights Act of 1965, 52 U.S.C. §§ 10101-10702.[2] Most recently, in May 2015, the Virginia NAACP sought to intervene as a plaintiff in the remedy stage of a federal racial gerrymandering lawsuit challenging a 2012 redistricting plan for Virginia's congressional delegation.[3] In that lawsuit, which involves a claim under the Equal Protection Clause of the Fourteenth Amendment and implicated Section 5 of the Voting Rights Act, a single judge denied the Virginia NAACP's motion to intervene.[4]

The Virginia NAACP's experience as a voting rights litigant in the Fourth Circuit leads it to conclude that the District Court's decision and Fourth Circuit's affirmance, if not vacated, threaten to undermine the Three-Judge Court Act, 28 U.S.C.

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[2] *See, e.g., Virginia State Conf. of the NAACP v. Kaine*, No. 3:08-cv-00692 (E.D. Va. Nov. 3, 2008); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989); *Smith v. Bd. of Sup'rs of Brunswick Cnty.*, 801 F. Supp. 1513 (E.D. Va. 1992); *Neal v. Coleburn*, 689 F. Supp. 1426 (E.D. Va. 1988); *Cosner v. Robb*, 541 F. Supp. 613 (E.D. Va. 1982); *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981).

[3] *See Page v. Virginia State Board of Elections*, 58 F. Supp. 3d 533 (E.D. Va. 2014) (three-judge court), *vacated and remanded sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

[4] *Page*, No. 3:13-cv-00678, ECF No. 169 (E.D. Va. May 26, 2015) (denying Motion to Intervene as Plaintiffs by Virginia NAACP).

§ 2284, as a key procedural safeguard for voting rights litigants. For this reason, *amicus* urges the Court to grant Petitioners' request to vacate the decision below and remand for consideration by a three-judge district court.

SUMMARY OF THE ARGUMENT

The District Court's decision and Fourth Circuit's affirmance reflect a fundamental misunderstanding of this Court's precedents interpreting the Three-Judge Court Act, and the recent experiences of the Virginia NAACP demonstrate why. The Fourth Circuit rule articulated in *Duckworth v. State Administrative Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003), and applied in the instant case is simply wrong: in a case requiring the convening of a three-judge panel under Section 2284(a), allowing a single judge to rule on a Rule 12(b)(6) motion is error. If allowed to stand, the decisions below would undermine one of the very purposes of the Act as amended in 1976; recognizing the fundamental importance of cases involving the basic structures of representative democracy, the high risk of the appearance of political bias influencing outcomes, the need for quick resolution and the importance of fostering confidence in the impartiality of the judiciary in such matters, Congress sought to provide an essential safeguard for voting rights litigants in reapportionment cases. That safeguard of a three-judge trial court and direct appeal to this Court is especially important following the elimination of a major voting rights protection, the coverage formula for pre-clearance under Section 5 of the Voting

Rights Act, in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In order to ensure that voting rights litigants receive the even-handed and deliberative consideration to which they are entitled under the Three-Judge Court Act, and to continue the important progress that the Voting Rights Act was intended to foster, the Court should vacate the decisions below and remand for consideration by a three-judge district court.

ARGUMENT

I. Requiring Important Procedural Decisions to Be Made by Three-Judge Panels, As Opposed to Single Judges, Ensures that Voting Rights Litigants in Reapportionment Cases—Cases of "Special Importance"—Are Treated Even-Handedly and Thoughtfully.

The importance of having three-judge panels adjudicate redistricting claims is illustrated by the recent experience of the Virginia NAACP in confronting the roadblocks created when a single judge makes important procedural decisions in a three-judge redistricting case. In *Page v. Virginia State Board of Elections*, a racial gerrymandering challenge to Virginia Congressional District 3, a district which enables black voters to elect their candidate of choice, a three-judge panel was convened, and that panel ruled that the district was racially gerrymandered in violation of the Fourteenth Amendment to the U.S. Constitution. 58 F. Supp. 3d 533, 538-39 (E.D. Va. 2014). In a 2-1 decision on October 7, 2014, the three-judge court

found that race predominated in the 2012 drawing of Congressional District 3, and because Defendants in that action failed to prove that such race-based drawing satisfied strict scrutiny, the court ordered the legislature to redraw the district. *Id.* at 555. Judge Robert E. Payne dissented. *Id.* (Payne, J., dissenting).

In May 2015, the Virginia NAACP sought to intervene in the remedial proceedings in that action, in part because the current Plaintiffs lived only in Congressional District 3, and voters of color all across the state would be impacted by the remedy passed by the legislature and approved by the three-judge court. *Page*, 3:13-cv-00678, ECF No. 157 (May 5, 2015) (Motion to Intervene as Plaintiffs by Virginia NAACP). Judge Payne, the dissenting judge in the opinion striking down the district, denied the Virginia NAACP's motion to intervene on May 26, 2015, despite having granted the motion to intervene of Republican U.S. Representatives David Brat and Barbara Comstock only two weeks earlier. *Page*, 3:13-cv-00678, ECF No. 169 (May 26, 2015) (denying Motion to Intervene as Plaintiffs by Virginia NAACP); ECF No. 165 (May 11, 2015) (granting Motion to Intervene as Additional Intervenor-Defendants). Judge Payne ruled that the Virginia NAACP did not satisfy any of the requirements for intervention under either Fed. R. Civ. 24(a) or 24(b), including on timeliness grounds. ECF No. 169 at 1-2. There are no apparent distinctions between the two motions to intervene in terms of timeliness, interest in the litigation, or adequacy of representation that would justify or

explain such disparate treatment by the single judge ruling on the motions.

While the Virginia NAACP's experience in the *Page* case was not related to a Rule 12(b)(6) motion, it is illustrative of the challenges that face voting rights litigants when a single judge can make important procedural decisions without the input of a larger panel, and it demonstrates how procedural rulings ultimately can be dispositive of a litigant's claims—which is why the Three-Judge Court Act continues to be a critical safeguard in redistricting cases.

This Court has long recognized that the Three-Judge Court Act "was designed to secure the public interest in 'a limited class of cases of special importance.'" *Phillips v. United States*, 312 U.S. 246, 249 (1941) (quoting *Ex Parte Collins*, 277 U.S. 565, 567 (1928)). Congress expressly included reapportionment cases in that limited class when it amended the Three-Judge Court Act in 1976, explaining that "these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases." S. Rep. No. 94-204, at 9 (1976).

This Court has similarly recognized that voting rights, including those implicated in reapportionment cases, are of special importance, stating at the height of the Civil Rights Movement that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we

must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (striking down a state's congressional redistricting plan as discriminatory).

By their nature, reapportionment cases necessarily involve the sensitive, controversial, and inherently subjective issue of how to draw distinctions among groups of people along geographic and demographic lines. In these cases of special importance, three-judge panels serve as a safeguard for the interests of minority groups by vesting discretion in three judges rather than a single judge, and requiring two votes instead of just one to dismiss a plausible claim. *See Phillips*, 312 U.S. at 250 (By requiring three-judge courts in certain cases of special importance, "Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge."). This need to err on the side of caution by convening a three-judge court exists not just in the trial stage of a reapportionment case, but also in the procedural and remedial steps involved in ultimate resolution of the issue. As John A. Buggs, staff director for the U.S. Commission on Civil Rights, wrote in a letter to Congress as it considered narrowing the Three-Judge Court Act in 1973:

> This more even-handed approach of three-judge courts is likely to appear not only in the substantive parts of cases, but also in procedural and evidentiary aspects as well. Although incorrect procedural rulings can be

> corrected on appeal, initial losses on important procedural motions can be extremely damaging to the posture of a civil rights case and to the political movement which generated it. There are also discretionary decisions—e.g., rulings on evidence critical to building a record and on the timing of what the court will hear and do—which in reality can't be corrected on appeal and which can determine the outcome of the case.

Three-Judge Court and Six-Person Civil Jury, Subcomm. on Courts, Civil Liberties, and Admin. of Justice of the Comm. on the Judiciary 146 (Oct. 10, 1973 & Jan. 24, 1974) (statement of John A. Buggs). Additionally, Buggs wrote, three-judge courts provide strength in numbers for judges in controversial civil rights cases in which the judges' decisions are likely to subject them to hostile public opinion. *Id.* Finally, because decisions from three-judge panels carry greater legal and moral authority than decisions of a single judge, they are more likely to be accepted and voluntarily complied with in controversial cases. *Id.* Indeed, while Congress did narrow the application of the Act in 1976, it explicitly retained the procedure for congressional and state legislative redistricting cases, in part for the reasons articulated above. *See, e.g.*, S. Rep. No. 94-204, at 9 (1976); 119 Cong. Rec. 666 (1973) (statement of Sen. Burdick).

By permitting a single judge to dismiss reapportionment challenges, the Fourth Circuit is

misapplying this Court's precedents and denying voting rights litigants in Virginia, West Virginia, Maryland, and the Carolinas the protections they are entitled to by statute against actual, implicit, or perceived bias, improper interpretation of applicable law, and delays in adjudicating their claims. These protections are enjoyed by similarly situated litigants in other circuits across the country, where three-judge courts have been convened in approximately two dozen voting rights cases since 2010.[5] This disparate treatment of voting rights litigants in the Fourth Circuit violates their statutory right to have their claims heard by a three-judge court and expeditiously appealed to this Court.

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[5] *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014); *Evenwel v. Perry*, No. 14-CV-335, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014); *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014); *Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013); *Brown v. Ky. Leg. Research Comm'n*, 966 F. Supp. 2d 709 (E.D. Ky. 2013); *Perez v. Texas*, 970 F. Supp. 2d 593 (W.D. Tex. 2013); *Ala. Leg. Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala. 2013); *New Hampshire v. Holder*, 293 F.R.D. 1 (D.D.C. 2013); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012); *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012); *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *James v. FEC*, 914 F. Supp. 2d 1 (D.D.C. 2012); *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012); *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012); *NAACP v. Snyder*, 879 F. Supp. 2d 662 (E.D. Mich. 2012); *Desena v. Maine*, 793 F. Supp. 2d 456 (D. Me. 2011); *Little v. Strange*, 796 F. Supp. 2d 1314 (M.D. Ala. 2011); *Petteway v. Henry*, No. 11-511, 2011 WL 6148674 (S.D. Tex. Dec. 9, 2011); *Schonberg v. FEC*, 792 F. Supp. 2d 14 (D.D.C. 2011); *Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011); *United States v. Sandoval County*, 797 F. Supp. 2d 1249 (D.N.M. 2011); *Clemons v. U.S. Dep't of Commerce*, 710 F. Supp. 2d 570 (N.D. Miss. 2010).

The shortcomings of single-judge determinations, and the need for protection at the procedural-motion stage, are apparent in the recent dispositions of cases in which a three-judge court has been requested in the Fourth Circuit. Since 2010 and post-*Duckworth*, a three-judge court has been requested in ten voting rights cases in the Fourth Circuit.[6] In four of those ten cases, the request for a three-judge court was denied.[7] In three of the four cases in which a three-judge court was denied, the case was subsequently dismissed under Rule 12(b)(6) by a single judge.[8] By permitting a single judge to dispose of voting rights cases where the parties are statutorily entitled to resolution by a three-judge court, the Fourth Circuit is failing to protect voting rights litigants and to provide them the benefits

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[6] *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014); *Jefferson Cnty. Comm'n v. Tennant*, 876 F. Supp. 2d 682 (S.D. W. Va. 2012); *Somers v. S.C. State Election Comm'n*, 871 F. Supp. 2d 490 (D.S.C. 2012); *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012); *Olson v. O'Malley*, Civil No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Gorrell v. O'Malley*, Civil No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011); *Carter v. Va. State Bd. of Elections*, No. 3:11-CV-00030, 2011 WL 1637942 (W.D. Va. Apr. 29, 2011); *Butler v. City of Columbia*, No. 3:10-CV-794, 2010 WL 1372299 (D.S.C. Apr. 5, 2010).

[7] *Benisek*, 11 F. Supp. 3d 516; *Olson*, Civil No. WDQ-12-0240, 2012 WL 764421; *Gorrell*, Civil No. WDQ-11-2975, 2012 WL 226919; *Carter*, No. 3:11-CV-00030, 2011 WL 1637942.

[8] *Benisek*, 11 F. Supp. 3d 516; *Olson*, Civil No. WDQ-12-0240, 2012 WL 764421; *Gorrell*, Civil No. WDQ-11-2975, 2012 WL 226919.

Congress intended in enacting the Three-Judge Court Act.

II. The Safeguard Provided by Three-Judge Panels in Reapportionment Cases Is Especially Important Following the Elimination in 2013 of a Major Voting Rights Act Protection in *Shelby County v. Holder*.

In *Shelby County v. Holder*, this Court justified striking down the coverage formula for Section 5 pre-clearance under the Voting Rights Act in part by identifying two other laws on which voting rights litigants can rely for protection. *See* 133 S. Ct. at 2628 (Fifteenth Amendment), 2631 (Section 2 of the Voting Rights Act). Writing for the majority, Chief Justice Roberts noted that the Voting Rights Act alone is insufficient to fully protect against "electoral arrangements that affect the value of minority votes," concluding that even the Section 5 pre-clearance scheme "does not cure the problem" of minority vote dilution resulting from reapportionment and other "second-generation barriers" to voting. *Id.* at 2629. Nonetheless, the Court invalidated the coverage formula for pre-clearance, and voting rights litigants in reapportionment cases were left with even fewer avenues for obtaining relief.

In this post-*Shelby County* legal environment where litigants under the Voting Rights Act are entirely dependent on Section 2 for relief, a three-judge court's protection against bias and assurance of "more weight and greater deliberation" are more

important than ever. *Phillips*, 312 U.S. at 250. This is especially so given the number of states that have acted quickly since the Court's decision in *Shelby County* to pass laws that would restrict access to the ballot or redistrict in the middle of the decennial U.S. Census cycle.[9]

Such attempts by the states to roll back voting protections are illustrative of a point NAACP Executive Director Roy Wilkins made in a statement to the U.S. House subcommittee considering continuation of the Three-Judge Court Act in 1973:

> The three-judge Federal court statute has been a principal vehicle on which minorities have resisted oppressive State legislative and administrative actions. That the Supreme Court caseload has increased under that statute is not a reason to condemn it. Rather, this increase speaks eloquently of the extent of the failure of States to honor, and in some cases, to abridge the constitutional rights of minorities.

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[9] *See Voting Laws Roundup 2015*, Brennan Center for Justice, June 3, 2015, http://www.brennancenter.org/analysis/voting-laws-roundup-2015 (noting at least 113 restrictive bills have been introduced in 33 states in 2015); *Voting Laws Roundup 2014*, Brennan Center for Justice, Dec. 18, 2014, http://www.brennancenter.org/analysis/voting-laws-roundup-2014 (at least 83 restrictive bills in 29 states in 2014); *Voting Laws Roundup 2013*, Brennan Center for Justice, Dec. 19, 2013, http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup (at least 92 restrictive bills in 32 states).

Three-Judge Court and Six-Person Civil Jury, Subcomm. on Courts, Civil Liberties, and Admin. of Justice of the Comm. on the Judiciary 146 (Oct. 10, 1973 & Jan. 24, 1974) (statement of Roy Wilkins). In the face of continuing efforts by state governments nationwide to dilute minority votes and roll back voting rights, particularly in the absence of pre-clearance under the Voting Rights Act, it is imperative that voting rights litigants be afforded their statutory right to have their cases weighed and resolved by a three-judge court.

Additionally, three-judge panels provide for expeditious resolution of reapportionment disputes under impending election deadlines, which is necessary to ensure orderly election administration and minimize voter confusion. *See* 17 Fed. Prac. & Proc. Juris. § 4040 (3d ed.) (citing Act of June 27, 1988, 100th Cong., 2d Sess., Pub. L. 100-352, 102 Stat. 662) (noting that Congress has intentionally preserved direct appeals from three-judge courts because "[t]here is little to be gained by delaying important litigation of the sort that initially commands an extraordinary district court of three judges—at least one of them a circuit judge—for review by three other judges on a court of appeals."). Moreover, redistricting plans exist at best for only one decade, until the next decennial Census. Delayed adjudication of plaintiffs' fundamental rights may allow elections to proceed for much of the decade using unconstitutional districts.

Expeditious review is even more critical given the inapplicability of Section 5. Prior to this Court's *Shelby County* decision, Section 5 operated to ensure

that voting changes could not be implemented until they had received federal pre-approval. *See* 52 U.S.C. § 10304(a). This allowed groups like the Virginia NAACP the time needed to review proposed changes and weigh in on their effect on protected voters. Now voting rights litigants bear the enormous burden of preventing a deleterious voting change from immediately going into effect. As a result, the expediency guaranteed by a three-judge panel is even more significant, and the Fourth Circuit should employ it as other circuits do—granting litigants the right to have important redistricting cases heard promptly by three judges, and then having a direct path for appeal to this Court.

CONCLUSION

For the reasons articulated above, *amicus curiae* respectfully requests that the Court grant Petitioners' request to vacate the decision below and remand for consideration by a three-judge district court.

Respectfully submitted,

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